

NO. 10-0582

IN THE SUPREME COURT OF TEXAS

THE UNIVERSITY OF TEXAS SOUTHWESTERN
MEDICAL CENTER AT DALLAS,
Petitioner,

v.

LARRY M. GENTILELLO, M.D.,
Respondent.

On Petition for Review from the
Fifth District Court of Appeals at Dallas, Texas
Cause No. 05-07-00845-CV

RESPONDENT'S RESPONSE TO PETITIONER'S EMERGENCY MOTION TO
ENFORCE STATUTORY STAY AND VACATE COURT OF APPEALS'
ORDER LIFTING STAY AND FIRST MOTION FOR EXTENSION OF TIME TO
FILE PETITION FOR REVIEW

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FILE PETITION FOR REVIEW**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

COMES NOW, Larry M. Gentilello, M.D., Plaintiff/Appellee/Respondent ("Respondent" or "Dr. Gentilello"), and in accordance with rule 10.1(b) of the Texas Rules of Appellate Procedure, files this Response to Petitioner's Emergency Motion to Enforce Statutory Stay and Vacate Court of Appeals' Order Lifting Stay and First Motion for Extension of Time to File Petition for Review, and respectfully represents as follows:

RESPONSE TO PETITIONER'S EMERGENCY MOTION TO ENFORCE
STATUTORY STAY AND MOTION TO EXTEND

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I. PROCEDURAL BACKGROUND

This Whistleblower Action involves an interlocutory appeal from the denial of Petitioner’s plea to the jurisdiction in July 2007. On remand from this Court, the Fifth District Court of Appeals (“Court of Appeals”) affirmed, for the second time, the trial court’s denial of Petitioner’s plea. *University of Tex. Southwestern Med. Ctr. at Dallas v. Gentilello*, No. 05-07-00845-CV, 2010 Tex. App. LEXIS 5707 (Tex. App.—Dallas July 21, 2010, no pet. h.) (TRAP 53.7 motion filed). (See Appendix Tab 5 to Petitioner’s Motion).

Following the issuance of the Court of Appeals’ opinion on remand, on July 30, 2010, Respondent filed his Second Amended Motion to Enforce Injunction, or Alternatively, Motion for Temporary Injunction. In this Motion, Respondent moved the trial court to enforce an agreement to maintain the status quo made by The University of Texas Southwestern Medical Center at Dallas (“UTSW”) to the former sitting judge of the 15th District Court of Dallas County, Texas (Hon. Mary Murphy),¹ and of which Dallas County Hospital District d/b/a Parkland Health and Hospital System (“Parkland”) testified in other proceedings that it was aware, to issue a mandatory injunction against UTSW and Parkland requiring reinstatement of Dr. Gentilello to trauma call and prohibiting further retaliation against him; and to award Dr. Gentilello the relief

¹ In front of then-presiding judge of the 14th District Court of Dallas County, Texas, Judge Mary Murphy, in July 3, 2007, counsel for Petitioner expressly agreed to maintain the status quo. (Resp. Apx. Tab 1 at pp 98). As shown by Petitioner’s public website, see <http://www.utsouthwestern.edu/findfac/professional/0,,14988,00.html>, last visited July 7, 2010, Petitioner has violated at least one aspect of the status quo by filling that chair position with Dr. Joseph Minei. At a minimum, this flagrant violation of the agreement to maintain the status quo should be addressed, as well as other violations Dr. Gentilello discussed exhaustively within his Motion at issue.

requested, or, alternatively to order the temporary injunctive relief requested. (*See* Appendix Tab 2 to Petitioner’s Motion at 15-16, 18).

On August 3, 2010, Petitioner filed a First Motion for Extension of Time to File Petition for Review with this Court, on the following grounds:

- (1) To enable UTSW to file a petition for review properly addressing the substantial issues raised in this case;
- (2) Because UTSW is an agency of the State of Texas, its counsel will need to consult and coordinate extensively with the Texas Attorney General’s Office in preparing the petition for review, which is now due one day after the Labor Day holiday; and
- (3) The undersigned attorneys for UTSW are engaged as counsel in other legal proceedings and matters that will take a substantial amount of time during the next few weeks and will prevent them from completing a properly prepared petition for review by September 7, 2010.

(*See* Petitioner’s First Motion for Extension of Time to File Petition for Review at pp. 2-3). In its “first” motion to extend the deadline, Petitioner requested an additional 15 days to file its petition for review, seeking September 22, 2010 as the new deadline to file the petition. (*Id.* at 3).

On August 4, 2010, Petitioner filed in this Court its Motion to Enforce Statutory Stay and Vacate Court of Appeals’ Order Lifting Stay, seeking immediate enforcement of the statutory stay of all proceedings in the trial court, pursuant to section 51.014(b) of the Civil Practice & Remedies Code. Respondent hereby responds to Petitioner’s motions.

II. SUMMARY OF THE RESPONSES

Petitioner seeks emergency relief that effectively allows it to thwart the purposes of its own stipulation, an agreement made before a district court judge in 2007 in open

court, to thwart the legislative purpose of the Whistleblower statute,² and, in doing so, to impart all manner of consequential damages on Dr. Gentilello—all while it continues to delay the finalizing of its interlocutory appeal, now in its third year. Assuming this Court may grant emergency relief here in the absence of a filed Petition for Review, which Dr. Gentilello first disputes, this Court should decline to stay the trial court proceedings and vacate the court of appeals' September 12, 2008 order—an order resulting from Dr. Gentilello's motion to which Petitioner did not even care to respond at that time.

This Court should allow the hearing on UTSW's agreement to maintain the status quo during the pendency of this appeal, and, if necessary, to allow the trial court to conduct a temporary injunction proceeding, all to ensure that the status quo is maintained during the remainder of Petitioner's interlocutory appeal. This relief is appropriate under Rule of Appellate Procedure 29.3, allowing an order by the court of appeals to protect the rights of the parties during appeal, and is further supported by section 554.003(a) of the Texas Government Code, expressly providing for injunctive relief in Whistleblower actions. This relief is also appropriate under the circumstances here, where Petitioner has taken the position since July 2007 in every court except the court of appeals that the trial court cannot conduct even a temporary injunction proceeding to address preservation of the status quo issues because of the statutory stay imposed by section 51.014(b) of the Civil Practice and Remedies Code. Indeed, in 2007, Petitioner asserted the trial court had

² The Whistleblower Act is a broad remedial measure intended to encourage disclosure of governmental malfeasance and corruption. *City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008).

no authority to conduct a temporary injunction, but represented to Judge Murphy that it agreed to maintain the status quo during its appeal of her ruling denying its plea to the jurisdiction. In exchange, the trial court asked Dr. Gentilello to accept Petitioner's agreement and then, if need be, seek relief in the court of appeals or come back to the trial court.³ Petitioner's counsel acknowledged the agreement, in part, in correspondence dated August 15, 2007, wherein he stated, "I represented to Judge Murphy that the chair would be left vacant, and that Dr. Rege would continue as interim."⁴ Dr. Gentilello did exactly what the trial court asked him to do. In August 2008, he sought relief in the court of appeals because he believes, and the public evidence from UTSW's own website now shows, that Petitioner has violated its agreement and stipulation.

³ (Resp. Apx. Tab 1). At the July 3, 2007 hearing, not only did the district court state several times on the record that Petitioner had agreed to maintain the status quo, she gave Petitioner the opportunity to discuss that issue with counsel, and once she went back on the record to memorialize the agreement, neither Petitioner nor Petitioner's counsel disputed the agreement by Petitioner to maintain the status quo. The following exchanges occurred concerning whether a temporary injunction proceeding (to preserve the status quo) could go forward because of the statutory stay imposed by appeal of the denial of Petitioner's Plea to the Jurisdiction:

THE COURT: Let's go back on the record. It's the Court's understanding that Defendants [sic] have [sic] agreed to maintain the status quo. . . . (Resp. Apx. Tab 1 at 102) (emphasis added).

* * *

THE COURT: . . . What I would suggest, in light of Defendant's agreement to maintain the status quo and pending further research, is that the matter be stayed under the statute provided you were filing an interlocutory appeal today.

. . . And if Plaintiff needs relief from that stay, you could seek that either from the Court of Appeals or at least I could have another hearing subject to that.

. . Defendant has agreed to maintain the status quo. Plaintiff wants Plaintiff reinstated. I don't know that I would have authority to do that even if I had the ability to go forward with this hearing [*i.e., temporary injunction*]. . . but I would ask that Plaintiff [sic] accept the agreement to at least maintain the status quo while we sort through some of these issues. (Resp. Apx. Tab 1 at 102) (emphasis added).

⁴ Resp. Apx. Tab 2.

Respondent's requests in the trial court are not overly broad in applying the limited stay afforded by the court of appeals, as he merely seeks preservation of the status quo and to address his damages resulting from the violation of Petitioner's agreement to do so. Nevertheless, at a minimum, this Court should decline to allow Petitioner to escape the enforcement of its promise, its agreement made in open court, its stipulation binding it to maintain the last actual, peaceable, noncontested status which preceded the pending controversy. *See State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975) In doing so, this Court will not force Petitioner to incur any litigation expenses or participate in "other proceedings" that conflict with its interlocutory appeal and the purpose of the statutory stay. Rather, the *only* expenses and litigation will be those resulting from its fight to preclude Dr. Gentilello's enforcement of its own agreement and representation to Judge Murphy, and those expenses and litigation resulting from its failure to do what it expressly represented to Judge Murphy it would do—maintain the status quo during the pendency of its interlocutory appeal.

Finally, this Court should decline to allow Petitioner to continue to delay the disposition of its interlocutory appeal through such procedural maneuvers as its "first" motion to extend the deadline to file its Petition for Review, especially given its position that *nothing* can be done during appeal to provide Dr. Gentilello any relief. Petitioner has violated its agreement to maintain the status quo. The delay in enforcement of that agreement, if this Court decides to stay the trial court proceedings regarding Dr. Gentilello's Second Motion to Enforce, should not be further extended because

Petitioner’s counsel has two other matters in which briefing is required prior to the deadline for filing the Petition in this Court, or because the Attorney General must confer with counsel. Petitioner has retained a distinguished international law firm, King and Spalding, to represent it, as well as the Attorney General for the State of Texas; either could assist with preparing the 15-page Petition for Review, whose purpose is not to fully brief the merits of the case, but to advise this Court how or why it should exercise jurisdiction over Petitioner’s interlocutory appeal, an appeal the Court generally does not have jurisdiction to entertain.⁵ Moreover, any additional requests for extensions should be denied, so this Court can process any eventual Petition for Review on an *accelerated* basis—which is required under Texas law for this interlocutory appeal. TEX. R. APP. P. 28.1.

ARGUMENT

I. This Court Should Deny Petitioner’s Motion to Enforce Statutory Stay

A. This Court May Not Issue Emergency Relief in the Absence of a Filed Petition for Review

Initially, Respondent urges that this Court does not have authority to issue emergency relief here, in the absence of a filed Petition for Review. Petitioner maintains that Texas Rule of Appellate Procedure 29.3 does not govern these issues. (Motion to Enforce at 13). Even ignoring Rule 29.3, the rules do not contemplate that any

⁵ Interlocutory appeals are generally final in the courts of appeals, TEX. GOV’T CODE § 22.225(b)(3), although exceptions to this general rule exist. *See* TEX. GOV’T CODE § 22.001(a)(1)-(2), (c), (d); *see also* *Univ. of Tex. Sw. Med. Ctr. of Dallas v. Margulis*, 11 S.W.3d 186, 187 (Tex. 2000) (per curiam). Exceptions include when a court of appeals’s decision conflicts with another court of appeals’s prior decision, or when there is a dissent in the court of appeals. *See* TEX. GOV’T CODE §§ 22.001(a)(2), 22.225(c).

proceeding exists here until a party has filed a Petition for Review. *See* TEX. R. APP. P. 53.1 (providing that one who seeks to alter the court of appeals’ judgment must file a petition for review addressed to this Court).

A motion for extension of time to file a Petition for Review gives this Court nothing to review, and therefore, cannot initiate the proceeding that must exist before this Court may grant emergency relief. *See, e.g., In re Kelleher*, 999 S.W.2d 51, 52 (Tex. App.—Amarillo 1999, original proceeding) (addressing rule 52.10(b) and concluding that the power of a court of appeals to grant emergency measures is ancillary to the power to adjudicate a *pending* petition, without which, the court of appeals has no dispute before it necessitating preservation of the status quo and empowering the court to act under rule 51.10(b)). Thus, having no petition for review before it as required under Rule 53, this Court may not grant emergency relief. *See id.* (addressing motion for emergency relief filed prior to petition for mandamus and concluding “one must commence a proceeding under . . . Rule 52.1 before relief can be granted pursuant to Rule 52.10”). As a result, this Court should deny Petitioner’s Motion to Enforce. *See id.*

B. The Court of Appeals Correctly Concluded that Texas Rule of Appellate Procedure 29.3 Allows Partial Lifting of the Section 51.014(b) Statutory Stay in a Whistleblower Action

Petitioner seeks relief based under section 51.014(b) of the Civil Practice and Remedies Code, requiring, during an interlocutory appeal such as this, a stay on “all other proceedings in the trial court pending resolution of that appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(b). Petitioner argues that an appellate court has “no authority to

partially lift section 51.014(b)'s stay, and that Rule of Appellate Procedure 29.3 does not contemplate such relief. (Motion to Enforce at 13).

Rule 29.3 provides:

When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24.

TEX. R. APP. P. 29.3 (emphasis added). Although rule 29.3 has had no further interpretation on these issues since Petitioner filed its last motion in this Court, the plain language of rule 29.3 contemplates temporary orders such as those expressly provided for in section 554.003(a) of the Government Code (providing relief in the form of temporary injunction). To that extent, Respondent relies on the authority cited within its prior Response in this Court, which Petitioner has not distinguished on any meaningful basis because, as Respondent concedes, there are no cases addressing this exact issue.⁶ While there are still no cases involving the same types of orders as that sought by Respondent in the court of appeals and in the trial court, it is clear that courts of appeals have the power to enter temporary orders as necessary to preserve the parties' rights until disposition of

⁶ See *Ranchos Real Developers, Inc. v. County of El Paso*, 138 S.W.3d 441, 444-445 (Tex. App.—El Paso 2004, no pet.) (involving protection of party's rights regarding posting bond, and to protect its own jurisdiction over the subject matter in the underlying appeal and providing relief through rule 29.3). See also *Lavigne v. Holder*, 186 S.W.3d 625, 627 (Tex. App.—Fort Worth 2006, no pet.) (involving appellate court's order to refrain from foreclosing on property after denial of application for injunction, to protect its jurisdiction); *Oryx Capital Int'l, Inc. v. Sage Apartments, L.L.C.*, 167 S.W.3d 432, 438 (Tex. App.—San Antonio 2005, no pet.) (explaining that no nonsuit could be filed or order signed while interlocutory appeal pending because those actions violated stay, but acknowledging that party could have asked appellate court to lift its stay to allow for nonsuit).

the interlocutory appeal. *See also In re Tex. Natural Res. Conservation Comm'n*, 85 S.W.3d 201, 210 (Tex. 2002) (Baker, J., dissenting).

Further, section 554.003(a) of the Government Code is a special provision, applying only to Whistleblower actions, while section 51.014(b) of the Civil Practice and Remedies Code is a general provision, applying to stay all types of actions involving interlocutory appeal of denials of pleas to the jurisdiction based on immunity. *See* TEX. GOV'T CODE ANN. §311.026; *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008). The statutes should be harmonized, if at all possible, and the specific will control over the general to the extent of conflict. *See id.* And simply because the general provision is the later enactment, it will not control where there is no manifest intent that the general provision prevails. *Id.* Here, the statutes may be harmonized, given the express purposes of the Whistleblower Act, as recognized by this Court, to allow certain issues to be considered by the trial court during the pendency of the appeal. *See id.* at 154. Indeed, the statutes should be harmonized, or the special must govern, where the Senate Bill Analysis of House Bill 4 indicates there was no substantive change through art. 1.03, which amended section 51.014(b). (Resp. Apx. Tab 2 [Bill Analysis, C.S.H.B. 4, May 14, 2003, at 2]). Because there has been no manifest intent shown that the general provision controls, the special provision found in section 554.003(a) should govern.

And, following the enactment of House Bill 4, this Court and its Advisory Committee spent several days reviewing and amending the rules of appellate procedure in conjunction with the changes made to Texas Civil Practice and Remedies Code section

51.014(b) in House Bill 4. Since then, several rules of appellate procedure have been reviewed and/or changed to reflect the new provisions in section 51.014, including Rule 29. In fact, the Court amended Rule 29.5 on August 20, 2008, in Administrative Order 08-9115. The comment to the change states, "Rule 29.5 is amended to be consistent with Section 51.014(b) of the Civil Practice and Remedies Code, as amended in 2003, staying all proceedings in the trial court pending resolution of interlocutory appeals of class certification orders, denials of summary judgments based on assertions of immunity by governmental officers or employees, and orders granting or denying a governmental unit's plea to the jurisdiction." Amendments to the Texas Rules of Appellate Procedure, 33 Tex. Reg. 7786 (September 12, 2008). Importantly, despite review from this Court and the Court's Advisory Committee, rule 29.3 has remained unchanged after the passing of House Bill 4 and the changes to section 51.014(b).

Petitioner states that the recognized purposes of interlocutory appeal is to resolve the question of sovereign immunity prior to suit rather than after a full trial on the merits, and to prevent needless waste of defense costs in cases that should have been dismissed. (Motion at 12 & nn.38, 39). The purpose of section 51.014(b), as stated by Petitioner, is the same. (*Id.*). Here, however, the only expenses and litigation complained of are those Petitioner has incurred in fighting to preclude Dr. Gentilello's attempt to preserve the status quo by asking the trial court to enforce *UTSW's agreement* made in open court in July 2007. (Motion at 13-15).

Dr. Gentilello's Second Motion to Enforce does not go "to the very heart of the merits issues in the case." Dr. Gentilello previously sued for temporary injunctive relief, and instead of proceeding on that hearing, the trial court accepted UTSW's agreement to preserve the status quo while the case was on appeal. Dr. Gentilello's Second Motion to enforce asks for the following relief:

- a. enforce the agreement to maintain the status quo by leaving the C. James Carrico, M.D. Distinguished Chair in Trauma and Surgical Care vacant pending the outcome of this litigation;
- b. issue a mandatory injunction against UTSW/Parkland requiring reinstatement of Dr. Gentilello to trauma call as was required under the status quo⁷;
- c. issue a mandatory injunction against UTSW prohibiting further retaliation against Dr. Gentilello;
- d. award Plaintiff his reduced and lost salary, wages, backpay, bonuses, and benefits incurred as a result of the violations of the status quo;
- e. grant a temporary injunction requiring UTSW and Parkland to refrain from altering Dr. Gentilello's position, status, compensation, or duties from those that he possessed prior to his reporting of the conduct complained of within his Original Petition, without a showing of strict compliance with the Master Services Agreement and Parkland's Medical Staff Bylaws; and

⁷ TEX. GOV'T CODE ANN. § 554.003(a)(1), (b)(1).

- f. award Plaintiff his attorney's fees incurred in having to enforce UTSW's violation of the injunction.

(Pet. Apx. Tab 2 at 15-16). Dr. Gentilello also alternatively requested a temporary injunction, as allowed by the court of appeals' order of September 12, 2008. (*Id.* at 16-18). The relief is expressly tied to UTSW's agreement to maintain and preserve the status quo, rather than the merits of the Whistleblower Action. (*Id.* at 15-18). And, to state, as Petitioner does, that *none* of the relief is allowed by the Whistleblower Act (Motion at 15) ignores the plain language of section 554.003(a).

Thus, Respondent urges this Court to deny Petitioner's relief in its entirety. Alternatively, to the extent that the Second Motion seeks relief greater than that afforded by the court of appeals' order, which Dr. Gentilello does not concede, this Court should grant UTSW partial relief only to that extent.

II. This Court Should Deny Petitioner's Motion to Extend Deadline to File Petition for Review, or Alternatively, Should Allow No More than One Extension of Fifteen (15) Days for Filing A Petition for Review in this Accelerated Appeal

Finally, this Court should deny Petitioner's request to extend the deadline to file his Petition for Review. As is made clear through the Motions filed here and its past litigation strategy in this case, Petitioner seeks to delay an ultimate ruling on the merits of Respondent's Whistleblower claim. Petitioner made express representations to the trial court in July 2007, and has violated its agreement in at least one aspect of its representations that it would preserve the status quo. Petitioner invokes the statutory stay (as it did in July 2007) to preclude Respondent from initially seeking a temporary

injunction (relief afforded under the Whistleblower Act), and both Respondent and the trial court relied on Petitioner's representation that it would maintain the status quo. Now that it has not, Petitioner invokes the stay to preclude any examination of the status quo issues, and to deny Respondent any protection of his rights during the pendency of Petitioner's appeal. This Court's discretion should not sanction such a result under these circumstances.

Thus, Respondent urges that this Court deny any extensions of time to file the Petition for Review, and to avoid further delay in advancing this accelerated appeal, especially if this Court grants Petitioner's stay of the hearing on his Second Motion to Enforce. *See* Tex. R. App. P. 28.1. Alternatively, this Court should allow only one limited extension of time no longer than fifteen (15) days as Petitioner requested in the "first" motion to extend, and should disallow further motions to extend by Petitioner.

CONCLUSION

Petitioner argued in the trial court in 2007, in this Court in 2008, and now, that Dr. Gentilello's hands are tied—he has no available relief to address the status quo issues until mandate finally issues in this appeal—which Petitioner wishes to delay as long as possible. Petitioner's position is that it can violate its agreement made in the trial court and acknowledged by not only the district court judge, but by its counsel in writing a short time later, and that it can continue to retaliate against Dr. Gentilello, and the trial court and this Court can do nothing to protect the rights of Dr. Gentilello or to preserve the status quo simply because it has appealed the denial of Petitioner's plea to the

jurisdiction. Petitioner's hopes of beating down Dr. Gentilello through protracted procedural maneuvers are not realized. Although he has recently had to sell his home and is living in a hotel, Dr. Gentilello has not succumbed to Petitioner's tactics.

This Court should deny Petitioner's request to enforce the section 51.014(b) statutory stay and to vacate the September 12, 2008 order lifting that stay for a limited purpose, and should also deny Petitioners the ability to continually delay the filing or further challenge of the denial of the plea to the jurisdiction through various motions to extend the time to file the petition for review. Through Petitioner's actions and the resulting stays imposed on Dr. Gentilello throughout the course of Petitioner's appeal, the legislative intent underlying the Whistleblower Statute has been thwarted. This Court should recognize those purposes and allow Dr. Gentilello's status quo issues to be heard.

This accelerated appeal has exacted three years of delay to date and Petitioner seeks to delay further the presentation of its Petition through its "first" motion to extend the deadline to file same. This Court should not condone any further delay in reaching the merits of the denial of Petitioner's plea to the jurisdiction, and should deny the "first" request to extend the deadline to file its Petition for Review, especially if it stays the proceedings regarding preservation of the status quo.

WHEREFORE, PREMISES CONSIDERED, Plaintiff/Appellee/Respondent Larry M. Gentilello, M.D. prays this Court deny Petitioner's Emergency Motion to Enforce Statutory Stay and Vacate Court of Appeals' Order Lifting Stay in all respects, deny Petitioner's First Motion for Extension of Time to File Petition for Review (or

alternatively limit the extension period to only one period of fifteen (15) days), and grant Respondent all such other and further relief that this Court deems just.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of this Response to Petitioner's Motion to Enforce Statutory Stay and Vacate Court of Appeals' Order Lifting Stay and First Motion for Extension of Time to File Petition for Review on the following counsel of record on the _____ day of August 2010 by the method indicated:

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DIANA L. FAUST

VERIFICATION OF RESPONSE AND APPENDIX

STATE OF TEXAS §
 §
COUNTY OF DALLAS §

On this day, Diana L. Faust appeared before me, being known by me to be the person whose signature appears below, and who, after being duly sworn stated under oath that: she is one of the counsel for Respondent in this case; that she has read this response and the appendix to the response; that the statements in the response concerning the proceedings in the trial court and the court of appeals are true and correct according to her knowledge. The orders, pleadings, and reporter’s record in the appendix to this response are true and correct copies of the orders, pleadings, and reporter’s record on file in this case.

DIANA L. FAUST

SUBSCRIBED AND SWORN TO on August 6, 2010, before me, the undersigned notary, in certification of which I executed by my hand and seal of office.

Notary Public in and for the State of Texas

My Commission Expires: _____